No. 82-1909

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCOOBA MANUFACTURING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In our petition we argued that the holding of the court of appeals that an employee's prounion statement was not concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157, raised an issue akin to that in *NLRB* v. *City Disposal Systems, Inc.*, cert. granted, No. 82-960 (Mar. 28, 1983), which might warrant holding the petition pending disposition of that case. Alternatively, we submitted that the decision below that an employer can discharge an employee simply for expressing a prounion sentiment without violating Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), conflicted with a prior First Circuit decision and therefore warranted review by this Court. Respondent has made several contentions that warrant a brief reply.

1. With regard to the relationship between this case and *City Disposal Systems, Inc.*, respondent merely asserts (Br. in Opp. 6-7) that the cases are different because, unlike the employee in *City Disposal*, respondent's employee, Willie, was not asserting a right expressly provided for in a collective bargaining agreement. We do not deny that there is an obvious factual difference between the cases, but the legal issue, viz., what conduct by a single employee is concerted activity within the meaning of Section 7, is the same and there is a realistic likelihood that this Court's decision on that issue in *City Disposal* will affect the validity of the decision below. Accordingly, holding this petition may be warranted.

2. Respondent does not dispute (Br. in Opp. 9) the Board's contention that an employer violates Section 8(a)(3) and (1) of the Act if the record shows that the employer discharged an employee for making prounion remarks. See *Randolph Division, Ethan Allen, Inc.* v. *NLRB*, 513 F.2d 706 (1st Cir. 1975). To avoid the application of this rule to its case, however, respondent mischaracterizes the decision below by stating that the court made an "implicit finding that Welch was not motivated by antiunion considerations in disciplining Willie" (Br. in Opp. 5 n.6) and that the court, on the contrary, "found that Willie's discipline was motivated by her insubordinate actions during a personal dispute with her supervisor" (Br. in Opp. 10 n.15).[1] *Respondent made those* contentions before the

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[1]Respondent's statement (Br. in Opp. 9) that "the Fifth Circuit found that Willie was discharged as a *result* of a *personal dispute* with Welch" is misleading. Rather, what the court found was that Willie's prounion "remark was the product of a purely personal dispute with Welch" (Pet. App. 4a). Thus, accepting the Board's finding that Welch expressly discharged Willie because of her prounion remark, the court nonetheless set aside the Board's conclusion that the discharge violated Section 8(a)(3) and (1) of the Act because, in the court's view, Willie's remark did not constitute concerted, protected activity because it was made in the context of a personal dispute.

Board, but they were rejected. Nothing in the decision below supports respondent's suggestion that the court of appeals, acting under a substantial evidence standard of review, reversed *sub silentio* the Board's credibility resolutions and findings of fact.[2] Indeed, if the court had accepted respondent's version of the facts and had determined that respondent's discharge of Willie was not motivated by her prounion remark, there would have been no occasion to discuss whether Willie's remark constituted concerted activity, protected under the Act.

Nor can it be seriously argued that the Board's finding of antiunion animus is not supported by the record. The Court need look no further than the statement of respondent's vice president, George Welch, in response to Willie's prounion statement: "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want" (Pet. App. 2a, 12a, 18a-19a). Accordingly, under the interpretation of Section 8(a)(3) and (1) embraced by respondent itself, there is no doubt but that it committed an unfair labor practice and, accordingly, the court of appeals plainly erred in declining to enforce the Board's order to that effect.

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[2]Respondent contended before the Board (Pet. App. 14a-16a) that the decision to discipline Willie was made before she even mentioned a union, on the basis of her allegedly insubordinate behavior, and that Willie was merely suspended, not discharged. The administrative law judge, discrediting much of respondent's evidence, rejected those contentions (Pet. App. 17a-21a); the Board affirmed (Pet. App. 7a-8a); and the court of appeals left the Board's findings of fact undisturbed (Pet. App. 2a-3a).

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted or, alternatively, it should be held pending the Court's disposition of *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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Respondent.

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MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

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A. INTRODUCTION

The respondent[1] in the above entitled case files this memorandum to advise the Court of certain facts which,

[1]Respondent Scooba Manufacturing Company, Inc., a Mississippi corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

in respondent's view, render a major portion of this cause moot.

The questions the petitioner seeks to raise on this appeal are twofold:

(1) Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158(a)(1), protect individual employee conduct in the absence of an extant collective bargaining agreement merely because the individual employee's conduct is deemed to affect other employees (Petition, pp. 6-7); and

(2) Whether the Fifth Circuit's determination that the facts of the instant case did not warrant a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), was erroneous (Petition, pp. 7-8).

B. THE SECTION 7 ISSUE

With regard to the Section 7 issue, the Petitioner states its position as follows:

> What [the Fifth Circuit's decision] ignore[s] is that the Board, relying on its expertise in these matters, has concluded that certain conduct undertaken by a single individual inherently affects all other employees and thus is within the coverage of Section 7. Accordingly, the Board argued, *inter alia*, in its petition in *City Disposal Systems, Inc.* (82-960 Pet. 11), that an employee who successfully asserts a right in a collective bargaining agreement necessarily benefits all members of the unit subject to that agreement. Hence, regardless of the specific employee's motive or personal interest in the outcome, the action is still concerted activity . . . . Similarly, any prounion statement made in the course of an employee-management discussion of alleged arbitrary employment practices sufficiently anticipates possible future union activity

> to be protected by Section 7. If the Board's position in *City Disposal Systems, Inc.* is sustained by this Court, the Fifth Circuit's requirement of specific evidence of "concertedness" in the present case would necessarily be undermined. . . .

Petition, pp. 6-7 (footnotes and citations omitted).

On January 6, 1984, the National Labor Relations Board rendered a decision in *Meyer Industries, Inc.*, 268 N.L.R.B. No. 73, 115 LRRM 1025 (1984), which overrules a long line of Board cases and completely reverses its position in the instant case. In *Meyers* the Board specifically rejected the "*per se* standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern. . . ." 268 N.L.R.B. No. 73, Slip Op. at 10, 115 LRRM at 1028 (emphasis in original). Accordingly, the Board now takes the position that, absent an existing collective bargaining agreement, the General Counsel must prove an individual employee acted "with or on the authority of other employees" in order to be engaged in protected activity. 262 N.L.R.B. No. 73, Slip Op. at 12, 115 LRRM at 1029.

The Board, in its *Meyers* decision, specifically distinguished Section 7's application in cases where no collective bargaining agreement existed and those cases involving an extant collective bargaining agreement. 262 N.L.R.B. No. 73, Slip Op. at 11, 115 LRRM at 1028. Consequently, the Board embraced the respondent's position in the instant case and recognized that the so-called "*Interboro* doctrine," currently under consideration by this Court in *City Disposal Systems, Inc. v. NLRB*, 683 F.2d 1005 (6th Cir. 1982), *cert. granted*, No. 82-960 (March 28,

1983), is fundamentally and conceptually distinguishable from the issue present here.

The *Meyers* decision completely reverses the petitioner's position on the Section 7 issue. As a result, the requisite adversity required to invoke the Court's jurisdiction is lacking thus rendering the issue non-justiciable. *See Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979); *Environmental Protection Agency v. Brown*, 431 U.S. 99, 103-04 (1977). Since the intervening *Meyers* decision renders the Section 7 issue moot, and, concomitantly, makes any decision regarding this issue purely advisory in nature, the respondent respectfully submits that the Court should not pass upon this issue.

C. THE SECTION 8(a)(3) ISSUE

The Section 8(a)(3) issue presented in the instant case is totally unworthy of this Court's review. Far from presenting a significant legal controversy warranting this Court's attention, the instant case presents only a disputed factual setting over which the parties are at issue (Brief of Respondent, pp. 9-10). Indeed, the Fifth Circuit has consistently applied the legal principles espoused in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980),[1] and, despite petitioner's assertions to the contrary, did not purport to alter those legal concepts in the instant case. *Compare NLRB v. Associated Milk Prod.*,

[1]This Court recently approved the Board's *Wright Line* analysis in *NLRB v. Transportation Management Corp.*, — U.S. —, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

Inc., 711 F.2d 627 (5th Cir. 1983) *with NLRB v. Charles H. McCauley Assoc., Inc.*, 657 F.2d 685 (5th Cir. 1981).

Accordingly, the instant case does not merit the Court's review pursuant to its long standing refusal to embroil itself in factual disputes where no significant legal issue is involved. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. CONCLUSION

For these reasons, respondent suggests that the Section 7 issue sought to be raised is moot and should be remanded with a direction to dismiss. Furthermore, the Section 8(a)(3) issue does not warrant this Court's review and the Petition, insofar as it relates to that issue, should be denied.

Respectfully submitted,

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